

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK J. HENRY,

Defendant-Appellant.

UNPUBLISHED
September 9, 2003

No. 240081
Wayne Circuit Court
LC No. 96-009068

Before: O’Connell, P.J., and Jansen and Fort Hood, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court’s denial of his motion for relief from judgment. We affirm.

We review for an abuse of discretion a trial court’s denial of relief from judgment under MCR 6.508. *People v Ulman*, 244 Mich App 500, 508; 625 NW2d 429 (2001). A defendant may not base a motion for relief from judgment on an issue that the defendant could have raised on direct appeal unless the defendant demonstrates good cause for failing to raise the issue on appeal and the issue caused actual prejudice. MCR 6.508(D)(3). “Actual prejudice” includes situations where, “but for the alleged error, the defendant would have had a reasonably likely chance of acquittal.” MCR 6.508(D)(3)(b)(i).

Defendant first argues that he received ineffective assistance from his trial counsel. A defendant receives effective assistance unless his attorney’s performance “fell below an objective standard of reasonableness” and consequently deprived the defendant of a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant specifically cites his counsel’s failure to pursue an insanity defense or offer testimony from a firearms expert. While a defendant has the right to have all substantial defenses investigated, prepared, and presented, *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990), the defendant must establish that the defense might have changed the outcome before a failure to do so constitutes ineffective assistance. *People v LeVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Until a defendant establishes otherwise, we presume that defense counsel’s decisions reflected sound trial strategy. *Id.*

Insanity will exonerate a defendant if, as the result of a mental illness, the defendant “lacks substantial capacity either to appreciate the nature and quality or the wrongfulness” of the conduct or to conform the conduct “to the requirements of the law.” MCL 768.21a(1). Unlike

the cases cited by defendant on appeal, defense counsel in the present case had little reason to believe an insanity defense would succeed. A clinical study conducted before trial found defendant legally sane at the time of the shooting. Defendant also hampered the insanity defense when, immediately after the shooting, he told police that he clearly recalled controlling the handgun's aim and discharge. Defendant confirmed this recollection at trial, but added that the handgun accidentally discharged after he finished safely firing the first few rounds into the ground. As in *LeVearn, supra*, defense counsel faced the dilemma of which poor defense to present. While defense counsel subtly argued defendant's past mental problems to the jury, he insinuated the problems in a way that supported the primary defense that defendant accidentally shot the victim when the handgun spontaneously discharged. Under these circumstances, defense counsel's actions represented trial strategy, not ineffective assistance. *Id.*

We also reject defendant's argument that his trial counsel provided ineffective assistance by failing to call a firearms expert. Although failure to call significant witnesses can constitute ineffective assistance, *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996), the decision whether to call a particular witness generally reflects trial strategy. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). The expert testimony at issue, proffered in a later hearing, tended to discredit the eye-witness testimony regarding where defendant aimed and suggested that a shooter would have difficulty hitting a target with the handgun from more than fifty feet. In this case, the expert's testimony failed to significantly counter the evidence that defendant competently handled firearms and expertly shot his crouching victim from roughly sixty feet away. The expert deemed "lucky" any successfully aimed shot under those circumstances but contrarily considered it plausible that defendant accidentally shot the victim under the same circumstances. Thus, the expert firearm testimony would have added little to defendant's case. Because defendant failed to establish that the decision not to call the expert affected the case's outcome, his argument that his trial counsel provided ineffective assistance fails. *Toma, supra* at 302.

Next, defendant argues that the trial court erred when it disallowed evidence of defendant's post-traumatic stress disorder. As the Supreme Court stated in *People v Carpenter*, 464 Mich 223, 241; 627 NW2d 276 (2001), a court may not admit "evidence of mental capacity short of legal insanity to avoid or reduce criminal responsibility by negating specific intent." Furthermore, the defense of diminished capacity did not apply to second-degree murder or other general intent crimes before *Carter* eliminated the defense, and defendant failed to present any other valid reason to introduce the evidence. *People v Biggs*, 202 Mich App 450, 454; 509 NW2d 803 (1993). Therefore, the trial court did not abuse its discretion when it excluded evidence of defendant's alleged disorder. See *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992).

Defendant also argues that the trial court erroneously excluded evidence that the victim had a history of abusing his girlfriend. Defendant fails, however, to explain the evidence's relevance. While a defendant may introduce a victim's past acts when the defendant claims self-defense, MRE 404(a)(2), defendant did not claim self-defense, so the trial court properly excluded the evidence. MRE 402.

Defendant next argues that comments by the prosecutor and the trial court denied him a fair trial. Defendant failed to object in the trial court, so he forfeited this issue. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). To avoid the forfeiture, he must

demonstrate plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Although a prosecutor must take care not to personally attack the defense counsel, *People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW2d 354 (1996), the law gives prosecutors great latitude to effectively present their arguments. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). Here, the prosecutor merely warned jurors that defense counsel was a charming man and an excellent attorney. These innocuous compliments fall well short of denying defendant a fair and impartial trial. *Kennebrew, supra*. Defendant does not specify which comments by the trial court denied him a fair trial, and none of the comments he cites demonstrate any partiality. Because defendant fails to demonstrate any possibility that the comments influenced the jury, this argument also fails. *People v Cheeks*, 216 Mich App 470, 480-481; 549 NW2d 584 (1996).

Finally, defendant challenges his sentence, arguing that the trial court improperly scored his offense as intentional, premeditated murder. In this case, the Supreme Court's sentencing guidelines apply because the offense occurred before January 1, 1999. *People v Reynolds*, 240 Mich App 250, 254; 611 NW2d 316 (2000). The Michigan Sentencing Guidelines (2nd ed), 77, prohibit a sentencing court from scoring a defendant based on premeditated intent to kill when the jury heard the same evidence and convicted the defendant of second-degree murder only. *People v LeMarbe (After Remand)*, 201 Mich App 45, 48-49; 505 NW2d 879 (1993). However, in *People v Raby*, 456 Mich 487, 496, 498; 572 NW2d 644 (1998), the Supreme Court held that scoring errors under the judicial guidelines did not automatically justify resentencing, because the guidelines simply aided judges and did not mandate adherence. Misapplication of the judicial sentencing guidelines creates a valid appellate claim only if a defendant can establish that the facts underlying the improper score lacked any support and were false and that the resultant sentence was disproportionate. *Id* at 497-499.

Even with the scoring error, the sentence falls within the judicial guidelines. Sentences within the guidelines are presumed proportionate, *Kennebrew, supra* at 609, and defendant failed to offer sufficient "unusual circumstances" to overcome the presumption of proportionality. See *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). Because defendant fails to demonstrate the required disproportionality of his sentence, the trial court's sentence stands. *Raby, supra*.

The trial court did not commit prejudicial error at trial or sentencing, so it did not abuse its discretion when it denied defendant relief from judgment. See *Ulman, supra* at 508.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood